

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 30 November 2004**

Case No.: 2003-BLA-5875

In the Matter of

JOE SIZEMORE

Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Respondent

**APPEARANCES:**

MARK L. FORD, Esquire  
For the Claimant

BRIAN DOUGHERTY, Esquire  
For the Respondent

BEFORE: JOSEPH E. KANE  
Administrative Law Judge

**DECISION AND ORDER – DENYING BENEFITS**

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On December 18, 200, a formal hearing was held in London, Kentucky. The parties were afforded full opportunity to present evidence and argue at the hearing, as provided in the Act and the regulations issued thereunder. The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Background and Procedural History

The miner filed the instant application for benefits on March 2, 2001. (DX 3). Born on April 25, 1932, the miner claims 16.5 years of underground coal mine employment operating machinery, in particular as a coal cutter. (DX 3-4, TR 10, 20). His last claim was denied in 1998 where the miner did not establish total disability due to pneumoconiosis. (TR 26, DX 1). He claims he last worked in the Nation's coal mines in November of 1967. (DX 3). He is not currently married. (DX 3). He suffered a broken back in 1952 and restricted any lifting after that. (TR 10-11). He reported being disabled after a subsequent back injury in 1967. (TR 11).

He reports taking breathing medications for the last 29 months including oxygen, Allbuterol, Hytrin, Severtent and Oruvail. (TR 12). He claims he smoked one-half a pack a day of cigarettes for his adult years and quit 14 years ago.

On February 14, 2003, the District Director issued a Proposed Decision and Order denying benefits for Mr. Sizemore. (DX 13). The Director found 10 years of coal mine employment, the presence of pneumoconiosis as a result of his coal mine employment but did not find that the miner had established the existence of a totally disabling respiratory condition caused by pneumoconiosis. By letter dated February 19, 2003, Claimant requested a revision of the Proposed Decision and Order stating that the arterial blood gas results of 62.5 PO<sub>2</sub> is lower than the disability standards (67.0) under the regulations. (DX 14).

On April 2, 2003, the District Director issued a Revised Proposed Decision and Order stating that the arterial blood gas study would not be probative of total disability where the study occurred during Claimant's hospitalization and indicate an acute condition and not total disability under the applicable regulations. (DX 15). The miner timely appealed the Director's decision to this office. (DX 16).

### Contested Issues

The District Director denied benefits under the instant claim stating that Mr. Sizemore failed to show that he is totally disabled due to pneumoconiosis. (DX 15)

The parties contest that the miner is totally disabled due to pneumoconiosis; and that he meets the threshold standard for refiled claims. (TR at 6).

### Coal Mine Employment

Mr. Sizemore claims 16.5 years of coal mine employment and the Director stipulated to at least ten years employment. (TR 8). The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. *See Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978).

Consequently, I find that Claimant established at least ten years of coal mine employment.

### Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to two different requirements. First, medical evidence must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. § 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that claimants are limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their entitlement to benefits under the Act. § 725.414(a)(2)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports, and physician opinions that appear in one single medical report must comply individually with these evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test, or arterial blood gas study. § 725.414(a)(2)(ii). Likewise, the district director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii).

The Claimant submitted a Stipulation of Objective Evidence at the formal hearing before this Judge.

#### A. X-ray reports

<u>Exhibit</u>	<u>Date of X-ray</u>	<u>Date of Reading</u>	<u>Physician/Qualifications</u>	<u>Interpretation</u>
DX 9	11/15/01	11/15/01	Baker	2/1
DX 9	11/15/01	12/17/01	Sargent/BC & B-reader	Quality only

B. Pulmonary Function Studies

<u>Exhibit/ Date</u>	<u>Physician</u>	<u>Age/ Height</u>	<u>FEV<sub>1</sub></u>	<u>FVC</u>	<u>MVV</u>	<u>FEV<sub>1</sub>/ FVC</u>	<u>Tracings</u>	<u>Comments</u>
DX 9	Baker	69/72"	2.61	3.82	74%	68%	Yes	Fair/Good

C. Arterial Blood Gas Studies

<u>Exhibit</u>	<u>Date</u>	<u>Physician</u>	<u>pCO<sub>2</sub></u>	<u>pO<sub>2</sub></u>	<u>Resting/ Exercise</u>	<u>Comments</u>
DX 9	11/15/01	Baker	40	67	Rest	
DX 10	03/09/02	Memorial Hospital	32.6	62.5		
DX 10	03/12/02	Memorial Hospital	36.9	63.4		

D. Narrative Medical Evidence

Glen Baker, M.D., examined the claimant on November 15, 2001. DX 9. The doctor took a standard employment history, recording 23.33 years of underground coal mine employment. Dr. Baker also noted a smoking history of one-half pack per day for forty years but ending fourteen years ago. The claimant's chief complaints during the examination were occasional cough with sputum production, daily wheeze, dyspnea upon exertion such as walking on level ground, chest pain and orthopnea. Beyond a physical examination (bibasilar medium rales on auscultation), the doctor also performed an electrocardiogram (normal), arterial blood gas studies (moderate resting arterial hypoxemia), pulmonary function test (mild obstructive defect), and a chest x-ray (2/1).

Dr. Baker diagnosed pneumoconiosis (based on abnormal chest x-ray and coal dust exposure), chronic bronchitis (based on history, cough, sputum production, examination and wheezing), chronic obstructive pulmonary disease (based on pulmonary function studies), hypoxemia (based on PO<sub>2</sub>) and ischemic heart disease. The doctor opined that the claimant has a mild respiratory impairment caused by his coal mine employment and his cigarette smoking but that he maintains the physiological capacity to continue his last coal mining job.

## DISCUSSION AND APPLICABLE LAW

### Threshold Issue for Subsequent Claims

Under the amended regulations of the Act, the progressive and irreversible nature of pneumoconiosis is acknowledged. 20 C.F.R. § 718.201(c). Consequently, claimants are permitted to offer recent evidence of pneumoconiosis after receiving a denial of benefits. *Id.* The new regulations provide that where a claimant files a subsequent claim more than one year after a prior claim has been finally denied, the subsequent claim must be denied on the grounds of the prior denial unless “the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. § 725.309(d). If a claimant establishes the existence of an element previously adjudicated against him, only then must the administrative law judge consider whether all the evidence of record, including evidence submitted with the prior claim, supports a finding of entitlement to benefits. *Id.* A duplicate claim will be denied unless the claimant shows that one of the applicable conditions has changed since the date of the previous denial order. *Id.*; *see, also Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998 (6<sup>th</sup> Cir. 1994).

Accordingly, because Mr. Sizemore’s previous claim was denied, he now bears the burden of proof to show that one of the applicable conditions of entitlement has changed. 20 C.F.R. § 725.309(d). I must review the evidence developed and submitted subsequent to the date of the prior denial, to determine if he meets this burden. *Id.* The remaining elements for Mr. Sizemore to establish are total disability due to pneumoconiosis.

### Total Disability Due to Pneumoconiosis:

Assuming that Claimant established the presence of pneumoconiosis, he must also establish that he is totally disabled due to pneumoconiosis. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. 718.204(b)(1). Under section 718.204(b)(2), there are several criteria for establishing total disability and the applicable criteria under these facts are: by qualifying pulmonary function tests or arterial blood gas studies and by a physicians reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques.<sup>1</sup> 20 C.F.R. 718.204(b)(2)(i) and (iii). I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

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<sup>1</sup> Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

### Pulmonary Function Tests

All pulmonary function study evidence must be weighed including testing done both pre- and post-bronchodilator administration. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980), *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). However, little or no weight may be accorded to a ventilatory study where the miner exhibited “poor” cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984). To be qualifying, the FEV<sub>1</sub> as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study, which is not accompanied by three tracings, may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984).

Turning to the evidence, I note that the test of Dr. Baker’s did not produce qualifying results. Therefore, total disability is not established by this method.

### Arterial Blood Gas Studies

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984).

The record contains three arterial blood gas studies. The reports indicate no contradiction of the regulatory quality standards, and consequently, I accord each blood gas probative weight on the issue of total disability. The District Director determined that where the Claimant was hospitalized when two qualifying tests were preformed, they do not represent probative evidence of total disability under 20 C.F.R. § 718.204, Appendix C to Part 718 because they were performed during a state of acute illness. Under Appendix C, “[t]ests shall not be performed during or soon after an acute respiratory or cardiac illness.” However, under *Vivian v. Director*, supra, the Director must submit a medical opinion or some evidence that the miner was being treated for an acute respiratory illness to render the tests unreliable. This was not done.

Therefore I must weigh the arterial blood gas studies to determine if the sum of the medical evidence established total disability. The test performed on March 9 is qualifying but the March 12 test is not. Dr. Baker's test was also non-qualifying. Where the last test showed improvement from the March 9 qualifying test and two other tests produced non-qualifying values, I find that the preponderance of the arterial blood gas evidence weighs against a finding of total disability.

### Medical Summaries

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. See *Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. See *Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. See *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

The record contains only Dr. Baker's opinion that Claimant is not totally disabled and that he retains the respiratory capacity to return to his former coal mine employment. It is irrelevant whether the report is well-documented or well-reasoned where Claimant bears the burden of proof on all elements and he has failed to produce any evidence of total disability. Therefore, total disability has not been established.

### CONCLUSION

After a review of the record in its entirety, the remaining conditions of entitlement have not been met and, therefore, Claimant has not established a material change in condition and consequently the claim of Mr. Joe Sizemore is denied.

### ATTORNEY'S FEES

The award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

A

JOSEPH E. KANE  
Administrative Law Judge

### NOTICE OF APPEAL RIGHTS:

Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board **within thirty (30) days** from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, Suite 500, 800 K. Street, N.W., Washington, DC 20001-8001. 20 C.F.R. § 725.481. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Francis Perkins Bldg., Room N-2605, 200 Constitution Avenue, N.W., Washington, DC 20210.